IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

WAVEDIVISION HOLDINGS, LLC	)	
MICHIGAN BROADBAND, LLC	)	
v.	)	**CIVIL ACTION NUMBER**
HIGHLAND CAPITAL	)	
MANAGEMENT L.P., TRIMARAN	)	08C-11-132-JOH
CAPITAL PARTNERS LLC,	)	
HIGHLAND CREDIT STRATEGIES	)	
FUND; HIGHLAND CREDIT	)	
STRATEGIES FUND, L.P.,	)	
HIGHLAND FLOATING RATE	)	
FUND, HIGHLAND FLOATING	)	
RATE ADVANTAGE FUND,	)	
HIGHLAND CREDIT	)	
OPPORTUNITIES CDO, L.P.,	)	
HIGHLAND CREDIT	)	
OPPORTUNITIES CDO LTD.,	)	
HIGHLAND CRUSADER OFFSHORE	)	
PARTNERS, L.P., HIGHLAND	)	
CRUSADER FUND GP, L.P.,	)	
HIGHLAND LOAN FUNDING V	)	
CORP., HIGHLAND LOAN	)	
FUNDING V LTD., BRENTWOOD	)	
CLO CORP., EASTLAND CLO	)	
CORP., GLENEAGES CLO CORP.,	)	
GRAYSON CLO CORP.,	)	
GREENBRIAR CLO CORP.,	)	
JASPER CLO CORP., LIBERTY	)	
CLO CORP., RED RIVER CLO	)	
CORP., SOUTHFORK CLO CORP.,	)	
BRENTWOOD CLO., LTD.,	)	
EASTLAND CLO, LTD.,	)	
GLENEAGLES CLO, LTD.,	)	
GRAYSON CLO, LTD., GREENBRIAR	)	
CLO, LTD.,JASPER CLO, LTD.,	)	
LIBERTY CLO., LTD., RED RIVER	)	
CLO, LTD., SOUTHFORK CLO, LTD.,	)	
ATASCOSA INVESTMENTS, LLC,	)	
BURNETT PARTNERS, L.P.,	)	
GILLESPIE INCOME FUND, LLC,	)	
HOPKINS CAPITAL PARTNERS, LLC,	)	
LOAN FUNDING IV, LLC,	)	
LOAN FUNDING VII, LLC.,	)	

MILAM HIGH YIELD, LLC,)
NAVARRO INVESTMENT PARTNERS,)
LLC, PIONEER FLOATING RATE)
TRUST, PRESIDIO CAPITAL)
MANAGEMENT, LLC, and **GRAND**)
CENTRAL ASSET TRUST,)

Submitted: December 11, 2009
Decided: March 31, 2010

MEMORANDUM OPINION

Upon Motion of Certain Defendant to Dismiss the First Amended Complaint - ***DENIED***

Upon Motion of Grand Central Asset Trust to Dismiss the First Amended Complaint - ***DENIED***

Upon Motion of Pioneer Floating Rate Trust to Dismiss the Second Amended Complaint - ***DENIED***

Appearances:

Gary F. Traynor, Esquire, of Pricket Jones & Elliott, P.A., Wilmington, Delaware, and Randall Johnson, Esquire, of Badgley-Mullins Law Group, Seattle, Washington, Attorneys for the plaintiffs

Daniel K. Hogan, Esquire, of the Hogan Firm, Wilmington, Delaware, and Michael P. Aigen, Esquire, of Lackey Hershman, L.P., Dallas, Texas, Attorneys for Certain Defendants

W. Harding Drane, Jr., Esquier, of Potter Anderson & Corroon, LLP, Wilmington, Delaware, and Anthony G. Stamato, Esquire, of Kaye Scholer, LLC, Chicago, Illinois, Attorneys for Grand Central Asset Trust

Christine H. Dupriest, Esquire, of Morris Nichols Arsht & Tunnell, LLP, Wilmington, Delaware, and Frances S. Cohen, Esquire, of Bingham McCutchen, LLP, Boston, Massachusetts, Attorneys for Pioneer Floating Rate Trust

HERLIHY, Judge

Plaintiffs, the disappointed buyers of cable systems in Michigan and the Pacific Northwest, allege that defendants, a series of investment funds and fund managers sabotaged the sale for their own gain. They are suing various entities claiming that they tortiously interfered with an existing contract to sell. After the initial complaint, the plaintiffs amended their complaint to add an additional 38 defendants, all of which are allegedly affiliated with defendant Highland Capital Management, LP. Those 38 newly added defendants move this Court to dismiss the amendment complaint. They allege that the complaint falls short of the required specificity, is untimely filed, and the defendants actions are justified business practices. The Court finds that complaint is filed timely and is specific enough under the lax pleading standard and that justification is a factual issue that cannot be decided at this procedural juncture. The defendants' motions are **DENIED**.

Factual Background[1]

A brief description of the individual parties is helpful in this analysis. WaveDivision Holdings, LLC ("Wave") is the attempted purchaser of Millennium Digital Media LLC's ("Millennium") cable systems and a plaintiff in this action. The other plaintiff, Michigan Broadband LLC, is Wave's affiliate. Millennium is the bankrupt cable provider and is now known as Broadstripe. Highland Capital Management, LP ("Highland") is an investment advisory firm that manages senior secured loans, high yield bonds, structured products, mezzanine debt and equities for its global investor base.

[1] All of the factual background is drawn from Wave's Second Amended Complaint. For purposes of this motion, all averments are taken as true.

Trimaran Capital Partners manages investments in private equity funds and below investment-grade corporate debt. Trimaran was managing an equity investment in Millennium. The Highland Managed Funds are a group of 38 Delaware or foreign investment entities that Highland allegedly managed, owned or controlled at all times relevant to this suit.

In 2005, Millennium had two tiers of debts outstanding. It had Senior Lenders, mostly banks, which owned senior secured notes. About one half of Millennium's outstanding debt was owned by the Senior Lenders. The other half of the debt instruments was to Increasing Rate Noteholders ("IRNs") that owned second-tier subordinated high yield debt. Defendants Highland and Trimaran, among others, own these bonds. Around that time, Millennium was experiencing financial problems and under demands from the Senior Creditors. It decided that it would attempt to sell its cable systems in Washington, Oregon and Michigan ("Systems"). It engaged a brokerage firm to find a possible suitor.

Wave was interested in buying the cable systems in question and in late 2005 it and Millennium signed a letter of intent, detailing the consideration to be paid. Millennium provided the IRNs with a copy of the letter of intent for the purpose of seeking the IRNs consent.

In January 2006, the IRNs (including Highland and Trimaran) and representatives of certain Highland managed funds met with Millennium and voiced their concern over the consideration offered by Wave. They felt that it was inadequate and "saw an opportunity for themselves in acquiring Millennium and is business in lieu of a sale to Wave."[2] The entities listed above sought information from Millennium so they could determine their return on investment for any new capital invested into Millennium.

On February 8, 2006, Wave entered into formal sale agreements with Millennium with terms consistent with the letter of intent. The sale of the Washington and Oregon systems was controlled by an Asset Purchasing Agreement ("APA") and the Michigan system was to be sold pursuant to the Unit Purchasing Agreement ("UPA"). The APA/UPA contained an agreement prohibiting Millennium from taking any action for three months that "could lead, directly or indirectly, to the transfer of the assets or business of the Systems to a party other than Wave." Trimaran, Highland and the Highland Managed Funds were aware of the terms of the APA/UPA.

Defendants then allegedly conspired to formulate a plan for acquiring the Systems Millennium was obligated to sell to Wave. They provided Millennium with a proposal to refinance Millennium's debt. That proposal was conditional upon a termination of the APA/UPA and included a debt for equity swap. The defendants combined owned over 52% of the IRN notes and they started to buy the positions of the Senior Secured Lenders in an effort to solidify their chances of blocking the sale to Wave and obtaining ownership of the Systems. Millennium maintains that the APA/UPA never required the IRNs' consent before the sale was approved. Although the APA/UPA provided a limited right to object to the sale under certain conditions, Millennium alleges those conditions were not

[2] SAC at ¶ 46.

met. Highland, Timaran and the Highland Managed funds were successful in scuttling the sale to Wave and the transaction was terminated on July 28, 2006. Shortly thereafter, the debt for equity swap was completed and Defendants and the IRNs became the beneficial owner of Millennium.[3]

Wave and its affiliate Michigan Broadband filed suit against Highland and Trimaran on November 17, 2008. They alleged tortious interference with contractual relations and civil conspiracy. This Court heard those defendants motion to dismiss and denied it without prejudice on March 6, 2009. Plaintiffs amended the complaint to include the 38 Highland Managed Funds defendants which is deemed to be filed on June 30, 2009. The second amended complaint ("SAC") also contains an aiding and abetting claim against the Highland Managed Funds.

The newly added defendants move this Court to dismiss the SAC. In total three motions were filed. Thirty-six funds are represented in one motion, and two funds individually filed their own motions.

Standard of Review

A motion to dismiss for failure to state a claim upon which relief can be granted[4] will not be granted if the plaintiff may recover under any conceivable set of circumstances susceptible to proof under the complaint.[5] All well pled allegations in the complaint will

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[3] *Id*. at ¶ 57.

[4] Super. Ct. Civ. R. 12(b)(6)

[5] *Spence v. Funk*, 396 A.2d 967 (Del. 1978).

be taken as true for purposes of the motion[6] and all reasonable inferences shall be taken in favor of the non-moving party.[7]

Parties' Contentions

Wave v. Certain Defendants

All of the newly added defendants with the exception of Pioneer Floating Rate Trust ("Pioneer") and Grand Central Asset Trust ("Grand Central") file a joint motion (these parties are collectively referred to as the "Certain Defendants" in their papers). First they argue that the complaint is barred by the three year statute of limitations. They claim that the statute begins to run when the cause of action accrues, regardless of whether the plaintiff was aware of it. The complaint states that the Highland Managed Funds met with Millennium and decided that the sale to Wave was not in the best interests of the company in January 2006. They argue the three year statute would bar any suit after January 2009. In the alternative, the Certain Defendants indicate that the alleged acts took place no later than April 2006. The record indicates that the complaint was amended on June 30, 2009, to include the Highland Managed Funds, under either of the Certain Defendant's alternatives, the complaint is not timely filed.

In response, plaintiffs argue that claim for tortious interference does not start to run until the interference causes the breach of contract. This, plaintiffs claim, occurred when the APA/UPA was terminated on July 28, 2006. Under that theory, the amendment was

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[6] *Id.*

[7] *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998).

timely filed.

The Certain Defendants further argue that refinancing Millennium's debt and purchasing existing debt was a legitimate response to an offer to Wave that they felt was inadequate. They argue that they were not strangers to the contract and therefore could not improperly interfere with them. In reliance, they cite *Hursey Porter & Associates v. Bounds*[8] for the position that a bank protecting its interest as a creditor does not constitute tortious interference. This justification, they contend, would require dismissal of all three claims.

Finally, the Certain Defendants direct the Court's attention to a recent Court of Chancery decision of *James Cable, LLC v. Millennium Digital Media Systems*[9] for the proposition that the defendants are protected by the affiliate privilege if they acted in furtherance of their own legitimate economic interests. They argue *James Cable* holds that absent an allegation of bad faith or malicious intention, the plaintiffs cannot state a cause of action for tortious interference.

In response, plaintiffs argue that the affiliate privilege does not apply because the Highland Managed Funds were simply creditors and not owners of the selling company. Also, they assert, *James Cable* is not applicable because defendants did not receive an ownership interest in the company until after the tortious interference, as opposed to the defendants in *James Cable* that owned it during the alleged interference. Further, they

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[8] 1994 WL 762670 (Del. Super. 2009).

[9] 2009 WL 1638634 (Del. Ch.).

allege that Restatement (Second) of Torts indicates that determining justification is fact driven and not appropriate for a motion to dismiss.[10]

Wave v. Grand Central

Defendant, Grand Central, one of the Highland Managed Funds, brings its own motion to dismiss. It first argues a statute of limitations substantively identical to the argument raised by the Certain Defendants. Plaintiffs respond with the analysis they argue in response to the Certain Defendants' motion

Grand Central sets forth an argument regarding affiliate privilege similar to the Certain Defendants. It argues that Grand Central is an affiliated company with Highland and that plaintiffs have not set forth any claims that lead to an inference that Grand Central acted with malice or in bad faith. It also argues that since the tortious interference charge must be dismissed, the civil conspiracy and aiding and abetting must be as well. Plaintiffs respond that Grand Central's position as a creditor does not invoke the affiliate privilege; and therefore, the complaint does not need to allege bad faith or malicious intent.

Next Grand Central argues that the plaintiffs have failed to satisfy the heightened pleading requirements imposed by Superior Court 9(b). It argues that the claim has a basis in fraud and the Rule requires a fraud claim be pled with particularity, which the complaint has not done. Plaintiffs dispute the contention that the complaint sounds in fraud. Without fraud, the heightened pleading standards of Rule 9(b) should not apply.

Wave v. Pioneer

[10] Restatement (Second) of Torts § 767 cmt. b.

Pioneer argues that the complaint is deficient in that it does not properly plead allegations that Pioneer controlled or managed Highland or was controlled or managed by it. Pioneer alleges that the allegations are conclusory and should be rejected by the Court. It states that conclusory allegations, those without specific facts supporting them, do not enjoy the same inferences that well pled facts enjoy. Further that this conclusory nature is evidenced by plaintiffs' complaint which simply states the elements required to plead a tortious interference claim without reference to the specific conduct that sets forth the allegations.

In response, plaintiffs restate the standard of review the Court must use on a motion to dismiss and state, "At best, Pioneer's contrary description of events and benevolent description of Highland's motive for blocking the sale to Wave creates issues that cannot be resolved at this time."[11] Plaintiffs state that it is within Pioneer's rights to file a motion for summary judgment after discover augments the record.

Pioneer also argues that the SAC does not allege that Pioneer intentionally acted or had knowledge of the contract. It alleges that some of the defendants acted with knowledge, but does not specifically state Pioneer's involvement. Pioneer then argues that its actions were justified through the affiliate privilege similar to the other two motions. Pioneer contends that the complaint does not properly allege an agreement necessary to plead civil conspiracy. Finally, it also argues that the complaint is barred by the statute of limitations.

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[11] Resp. to Pioneer's Mot. to Dismiss at 3.

Plaintiffs respond by arguing that the Highland Managed Funds should be liable because they were either directing Highland to block the sale; or Highland Managed Funds took actions, at the behest of Highland, to block the sale. Plaintiffs argue that the Highland Managed Funds are liable either by the agent's actions being imputed onto the principal or by the defendants' direct action.

Pioneer presents the same argument concerning the affiliate privilege that the other two motions set forth. It states that this justification requires the aiding and abetting claim as well as the civil conspiracy claim be dismissed. Plaintiffs set forth the same arguments that they did in the first two motions. Finally, Pioneer alleges a statute of limitations issue similar to the previous two.

Discussion[12]

Wave's Second Amended Complaint was Timely Filed

Claims for tortious interference are controlled by a three year statute of limitations.[13] Both parties agree that the statute of limitations will begin to run the date Wave's cause of action began to accrue.[14] Our Supreme Court has clearly defined the standard for a cause of action for tortious interference.[15] Plaintiffs must allege, "(1) a

[12] Due to the similarity of the three motions and the applicability of any of the Court's holdings to all the Highland Managed Funds, the Court will address each argument as if it was on behalf of all the Highland Managed Funds.

[13] 10 *Del. C.* § 8106.

[14] *Smith Kline Beecham Pharm. Co. v. Merck & Co., Inc.*, 766 A.2d 442, 450 (Del. 2000).

[15] The tortious interference claim is the underlying tort upon which the civil conspiracy and aiding and abetting claim rely. If, for any reason, the tortious interference claim is dismissed the (continued…)

contract, (2) about which the defendant knew and (3) an intentional act that is a significant factor in causing the breach of such contract (4) without justification (5) which causes injury."[16] Similarly, civil conspiracy requires, (1) a confederation or combination of two or more parties, (2) an unlawful act done in furtherance of the conspiracy and (3) actual damage.[17] The aiding and abetting a tortious conduct claim requires an underlying tort and is predicated upon the tortious interference.[18] claim.

The Supreme Court has also stated that the cause of action begins to accrue at the time a tort is committed.[19] Our case law also details that the statute of limitations begins to run on the date the wrongful act is committed.[20] The Court held, "[T]he cause of action 'accrues' under Section 8106 at the time of the wrongful act, *even if the plaintiff is ignorant of the cause of action*."[21] However, in a claim where injury is a required element, such as tortious interference, the plaintiff could not file suit until the injury occurred. The wrongful acts are not yet actionable, as no cause of action could be

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[15](...continued)
other two causes of action will follow suit.

[16] *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus., Inc.*, 871 A.2d 428, 437, n. 7 (Del. 2005)(citing *Aspen Advisors, LLC v. UA Theater Co.*, 861 A.2d 1251, 1256-66 (Del. 2004)).

[17] *Nicolett v. Nutt*, 525 A.2d 146, 149-50 (Del 1987).

[18] *Anderson v. Airco, Inc.*, 2004 WL 2827887 (Del. Super.).

[19] *Boerger v. Heiman*, 965 A.2d 671 (Del. 2009).

[20] *See Walmart Stores, Inc. v. AIG Life Ins. Co*, 860 A.2d 312, 319 (Del. 2004)(holding the breach of contract, fraud, breach of fiduciary duty and unjust enrichment claims begin to run statute of limitations on the day of the wrongful conduct).

[21] *Id.*

sustained. Because of this, the statute of limitations does not begin to run until the date the plaintiff suffered injury.

For the purposes of a motion to dismiss, the Court must accept the allegations in the complaint as true. The complaint alleges that a contract was formed between Millennium and Wave on February 8, 2006, the earliest possible date that a contract could be breached.[22] Defendants point to the allegation that they met with Millennium in January of 2006 and stated that they believed the purchase price being offered to Wave as inadequate as the date the Court should start the three year clock.[23] This however, in inaccurate. A contract cannot be tortiously interfered with until it exists. That did not occur until February 8, 2006.

The contract was breached at an unspecified time, when according to the complaint, "Highland-Managed Funds conspired to formulate a plan for acquiring the systems Millennium was obligated to sell to Wave as an alternative to the sale of assets to Wave."[24] This constitutes a breach because the APA/UPA "prohibited Millennium from taking any action, while the agreements were in force and for three months following termination that could lead, directly or indirectly, to the transfer of the assets or business of the Systems to a party other than Wave."[25] Although Millennium is in breach when it

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[22] SAC at ¶ 48.

[23] *See id.* at ¶ 46. Plaintiffs have not alleged a cause of action for tortious interference with a prospective business relationship.

[24] *Id.* at ¶ 51.

[25] *Id.* at ¶ 49.

met with the Highland Managed Funds, the tortious interference claim did not begin to accrue until a later date.

To survive a dismissal, the complaint must allege all of the elements of tortious interference.[26] The final element is injury. A cause of action does not accrue until the plaintiffs suffer an injury. The complaint specifies the injury:

> Millennium used the objection by the IRN Holders to the Wave transaction as a pretext for negotiating the transfer of the assets to Defendants. Millennium subsequently, on July 28, 2006, terminated the Wave transaction and refinanced its debt with the IRN Holders and Defendants. As a result of the transaction, Defendants and the IRN Holders became the equitable owners of Millennium and the assets that Millennium was contractually obligated to sell to Wave.[27]

The earliest date Wave could have filed a tortious interference claim was July 28, 2006. Under § 8106, the complaint would be timely if filed any time before July 27, 2009. The parties stipulate the SAC was filed June 30, 2009. It was timely filed.

Wave's Complaint States a Claim Upon Which Relief Can be Granted

Grand Central argues that the Court should require Wave to plead according to the particularity provisions of Rule 9.[28] Grand Central cites *Nutt v. A.C. & S., Inc.* for the proposition that the conspiracy must be pled with particularity.[29] *A.C. & S., Inc.*,

[26] *Malpiede v. Towson*, 780 A.2d 1075, 1099 (Del. 2001).

[27] SAC at ¶ 57.

[28] Super. Ct. Civ. R. 9(b)("In all averments of fraud, negligence or mistake, the circumstances constituting fraud, negligence or mistake shall be stated with particularity. Malice, intent, knowledge and other condition of mind may be averred generally").

[29] Grand Central Mot. to Dismiss at 7 (citing *Nutt v. A.C. & S., Inc.*, 466 A.2d 18, 23 (Del. Super. 1983)).

however, is distinguishable because it actually contained an allegation of fraud.[30] Here, Grand Central argues that the Court should read an allegation of fraud where one does not exist. It states:

> In the Complaint, Plaintiffs allege that the defendants conspired to acquire the business opportunity Millennium had contracted to sell to Wave. As part of this conspiracy Plaintiffs allege that [Grand Central] and the other defendants "used language from the Wave agreements, purportedly requiring the IRN Holder consent to the transfer, as a pretext for scuttling the sale to Wave." Disputing the plain terms of the agreements, Plaintiffs also claim that the defendants used clauses in the agreement to object to the Wave transaction as a "pretext" for negotiating the transfer of assets to the defendants.
>
> These allegedly pretextual actions amount to averments of fraudulent conduct on the part of [Grand Central] and the other defendants.[31]

Grand Central does not rely upon, and the Court's research has not found, any cases in which this Court or the Court of Chancery has used Rule 9 to determine the breadth of a properly pled conspiracy claim where the underlying tort was tortious interference with a business contract. Reading the complaint in the light most favorable to the Plaintiffs, as the Court must, there is no allegation of fraud. Plaintiffs set forth a cause of action for tortious interference, civil conspiracy, and aiding and abetting. The final two are dependent upon the first claim. While the complaint alleges that a "pretext" was used, it does not allege any misrepresentation needed for a fraud claim. Rule 9(b)'s heightened pleading standards are not applicable and the Wave must provide defendants with notice

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[30] *A.C. & S., Inc.,* 466 A.2d at 18.

[31] Grand Central Mot. to Dismiss at 8 (citations to complaint omitted).

pleading under Rule 8.[32]

Rule 8 requires, "[A] short and plaint statement of the claim showing that the pleader is entitled to relief."[33] The Supreme Court has observed, "The intent and effect of this rule is to permit a claim to be stated in general terms and to discourages battles over the mere form of the statement."[34] The Court further stated, "To the pleadings is normally assigned the task of general notice-giving. The task of narrowing and clarifying the basic issues and ascertaining the facts relative to other issues is the role of the deposition discovery process."[35] The Court has not set a high standard for determining a "well pleaded allegation." "An allegation, though vague or lacking in detail, is nevertheless 'well pleaded' if it puts the opposing party on notice of the claim being brought against it."[36]

After reviewing the SAC, the Court finds that all the defendants are put on notice of each of the elements of every claim averred against them. The SAC alleges, (1) a contract,[37] (2) about which the defendant knew[38] and (3) an intentional act that is a

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[32] Super. Ct. Civ. R. 8; *see also, Spanish Tiles, Ltd. v. Hensey*, 2005 WL 3981740 (Del. Super.)(applying Rule 8 pleading standards to similar claims as alleged in the case at bar).

[33] Super. Ct. Civ. R. 8(a).

[34] *Del. Valley Drug Co. v. Kline*, 144 A.2d 403, 405 (Del. 1958).

[35] *Id.*

[36] *Precision Air, Inc. v. Standard Chlorine of Del., Inc.*, 654 A.2d 403, 406 (Del. 1995).

[37] SAC at ¶¶ 48, 60.

[38] *Id.* at ¶¶ 50, 61.

significant factor in causing the breach of such contract[39] (4) without justification[40] (5) which causes injury.[41] All of the elements are properly pled.[42] Although the complaint does not name the defendants individually, the Highland Managed Funds are defined to include all of the defendants now moving for dismissal. Under the relaxed pleading standards set forth in Rule 8, the complaint properly alleges the required knowledge and intent of all the moving defendants.[43] Because the complaint states a cause of action for tortious interference, it also states a cause of action for the two related torts of civil conspiracy and aiding and abetting.[44]

Issues Concerning Justification Cannot be Decided at a Motion to Dismiss

All three motions raise a justification argument in one of two ways. Pioneer alleges that the complaint does not properly allege a lack of justification, which is required to

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[39] *Id.* at ¶¶ 51, 55, 62.

[40] *Id.* at ¶ 63.

[41] *Id.* at ¶¶ 58, 64.

[42] In response to Pioneer's argument that Wave did not properly plead an intentional act, Wave argues that it can rely on agency principles to impute the acts of the Highland Managed Funds on to Highland. The Court rejects any agency principles because it was never properly alleged that Highland Managed Funds are in fact the Highland's principal. The SAC states, "At all times relevant hereto, Highland Capital controlled, owned or was the investment manager for [the Highland Managed Funds]." SAC at ¶ 13. This alleges either a parent-subsidiary or an agency relationship and is insufficient to put the defendants on notice of the relationship alleged. The Court did not rely on agency principles in determining that the SAC stated a claim.

[43] Had this been a motion for summary judgment, the Court would be required to more closely scrutinize the allegations to determine if the there were any genuine issues of material fact relating an individual fund's involvement in the interference, or lack thereof.

[44] All parties argue that without an underlying tort claim the civil conspiracy and aiding and abetting claim must fail. Based on the Court's holding with respect to the tortious interference claim, those arguments are without merit at this time.

properly plead tortious interference. It then relies on *Shearin v. E.F. Hutton Group, Inc.*[45] for the position that "the plaintiff must plead and prove that a defendant sought not to achieve permissible financial goals, but sought maliciously or in bad faith to injure the plaintiff."[46] Pioneer alleges that complaint is deficient in its averments of bad faith.

Pioneer appears to meld two related, but distinct, concepts in its argument. The reliance on *Shearin*[47] is misplaced as a general pleading rule. *Shearin* is applicable to when the defendant can claim the affiliate privilege, which is not applicable here.[48] The general pleading rules for unaffiliated companies are different and offer little protection on a motion to dismiss.

A recent Court of Chancery decision, *Grunstein v. Silva,*[49] succinctly summarizes the defendants' undesirable position at this procedural juncture:

> [T]he action must also be "without justification" or "improper" in order to subject the actor to liability. Whether something is improper depends on a number of factors, chief among which is the nature of the conduct at issue. The issue is not simply whether the actor is justified in causing the harm, but rather whether is he is justified in causing it in the manner in which he does cause it. The question of whether an action is improper is a factual determination not readily amenable to assessment by way of a motion to dismiss.[50]

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[45] 652 A.2d 578, 590-91 (Del. Ch. 1994).

[46] Pioneer Mot. to Dismiss at 8.

[47] 652 A.2d 578 (Del. Ch. 1994).

[48] *Infra* at 17.

[49] 2009 WL 4698541 (Del. Ch.)

[50] *Id.* at *16; *see also, Thomas v. Hartford Mut. Ins. Co.*, 2004 WL 1102362 (Del. Super.)(using the standards set forth in Restatement (Second) of Torts § 766 to deny summary (continued…)

The Court agrees with the Chancery's logic in *Grunstein*. A motion to dismiss is not the appropriate avenue to challenge this highly factual determination. The complaint properly pleads a lack of justification. The justification issue can be re-raised in a motion for summary judgement after discovery, if appropriate.

The Affiliate Privilege Does Not Protect a Breaching Party's Creditors

The defendants also claim they are protected by the affiliate privilege. The defendants rely on *Shearin* and *James Cable* for the proposition that because the allegedly tortiously interfering company and the breaching party are affiliated, its actions are justified; and therefore, the tortious interference claim must fail. In response, Wave argues that the Highland Managed Funds, like Highland, are simply creditors and the affiliate privilege only applies to entities in a parent-subsidiary relationship. The Court agrees with Wave's interpretation of *Shearin* and its progeny.

The Court of Chancery held in *Shearin* that an "affiliated entity cannot be liable in tort for interfering with a contract between its affiliate and a third party."[51] It went on further to state:

> *[W]here corporations affiliated through joint ownership* confer with respect to a contract to which one of them is a party and a breach of that contract follows, there can be no non-contractual liability to the affiliated corporation, which is privileged to consult and counsel with its affiliates, unless the plaintiff pleads and proves that the affiliate sought not to achieve permissible

[50](…continued)
judgment on the issue of whether defendants' acts were justified).

[51] *Shearin*, 652 A.2d at 590.

financial goals but sought maliciously or in bad faith to injure plaintiff.[52]

Defendants claim that *James Cable* is instructive. Curiously, *James Cable* includes many of the same actors as the case at bar; however, the parties' relationship is quite different. James Cable agreed to sell its cable company to Millennium. The parties agreed to the sale in October 2007, after the events of this suit and after Highland became the controlling *shareholder* of Millennium. After that sale was scuttled, James Cable sued Highland for tortious interference.[53] The court found that the affiliate privilege detailed in *Shearin* applied because Highland and Millennium were affiliated through common ownership and existed as a parent-subsidiary.[54]

The arrangement between Millennium and Highland (and the Highland-Managed Funds) is markedly different. The SAC alleges that "Highland and the Highland related entities owned approximately 10% of the senior secured credit facility and approximately 10% of the IRN notes."[55] At all times relevant to the alleged tortious interference, defendants owned debt instruments and were Millennium's creditors. *Shearin* limited its definition of "affiliates," and therefore its application of the affiliate privilege to owners of breaching company. No Delaware court has since expanded this definition and this Court sees no reason to do so. The affiliate privilege does not apply to creditors alleged to have tortiously interfered with a third party's contract.

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[52] *Id*. at 591 (emphasis added).

[53] *See James Cable*, 2009 WL 1638634, at *1-3.

[54] *Id*. at *4-5.

[55] SAC at ¶ 54.

Conclusion

For the foregoing reasons all defendants motions to dismiss are **DENIED**.

IT IS SO ORDERED.

J.